

## How and Why We Write

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## HOW AND WHY WE WRITE

*Jamie Lee Mignon\**

I believe that man will not merely endure; he will prevail. He is immortal, not because he alone among creatures has an inexhaustible voice, but because he has a soul, a spirit capable of compassion and sacrifice and endurance. The poet's, the writer's duty is to write about these things. It is his privilege to help man endure by lifting his heart, by reminding him of the courage and honor and hope and pride and compassion and pity and sacrifice which have been the glory of his past. The writer's voice need not merely be the record of man, it can be one of the props, the pillars to help him endure and prevail.<sup>1</sup>

Sometimes, it is best not to try to explain overly much a concept which has been explained to perfection by another. So it is the above quote I offer in explanation as to why I seek to examine the skills we utilize and the intentions we act upon when we operate as communicators within the realm of law. This essay does not pretend to be a "how to write better" for the legal community. There are already plenty of those such articles and books in circulation.<sup>2</sup> Nor does this essay aspire to touch upon all of the relevant topics connected with legal writing. This essay will be quite brief. This is not an accident.

Stephen King's best selling "On Writing"<sup>3</sup> contains a "Second Forward," wherein King explains that it will be "a short book because most books about writing are filled with bullshit."<sup>4</sup> I couldn't agree more. Thus, this is a short essay on writing. I can, and should, be even more clear. The purpose of this essay is to illuminate those spe-

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\* Managing Editor of Lead Articles, DePaul Law Review, 2000-2001. Thanks and love to my wife, Sherry Barrett-Mignon, DePaul College of Law, Class of 2003, without whom this essay would not have been possible.

1. William Faulkner, address upon receiving the Nobel Prize for literature, Stockholm, Sweden, December 10, 1950, *Essays, Speeches & Public Letters*, p. 120 (1951).

2. See, e.g., Robert B. Smith, *The Literate Lawyer: Legal Writing and Oral Advocacy* vii (3<sup>rd</sup> ed. 1995); John D. Feerick, *Writing Like a Lawyer*, 21 *Fordham Urb. L.J.* 381 (1994); Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 *Cooley L. Rev.* 1 (1992); Tom Goldstein & Jethro K. Lieberman, *The Lawyer's Guide to Writing Well* 4-5 (1991); George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 *Mich. L. Rev.* 333 (1987); Robert W. Benson, *The End of Legalese: The Game is Over*, 13 *N.Y.U. Rev. L. & Soc. Change* 519 (1984-85).

3. STEPHEN KING, *ON WRITING* (Scribner, 2000).

4. KING, *supra* note 5, at 11.

cific elements of pillar-building, to which Faulkner refers above, which are of particular importance to the DePaul legal community.

It is this combination of the use of words and the power which they possess which go directly to the heart of the reason why we should reflect upon our purpose as legal writers, and in turn, our purpose as a law review. As judges, lawyers, educators, and students of law, we use our writings as both shield and sword. It should not escape our notice that we often analogize the use of words to the use of weaponry. Certainly, one of the most formidable powers on earth is man's ability to master language, to use it as a tool of persuasion, and to wield its awesome power in the role of the advocate. It is our mastery of language which allows us to communicate to one another such profound concepts as love, faith, and mercy. In the realm of legal scholarship, the law review is one of our most awesome tools of communication and persuasion. Law is, after all, "a profession of words,"<sup>5</sup> and it is the law review that allows us to communicate with one another as professionals. Law reviews serve as touchstones of wisdom and pools of empirical data which we may all use to achieve our ends. It is this idea, that we all seek different means to different ends, which obligates us to periodically re-examine what it is we all have in common. In one way or another, we all have the DePaul College of Law in common. To that end, it is incumbent upon us to recognize our writings as a power which we are obligated to use for the best of reasons, with purest purpose, and with the recognition that what we do with this power today is directly related to the society in which we live tomorrow.

Faulkner alludes to a very significant concept that is elemental to the building of both a society and a respectable law review: the idea of a firm and just foundation. For, as we well know, it is the foundation upon which we base all those elements of a society which go toward its success as a democracy. We know that the pillars of any society must be just or it cannot stand. St. Augustine, in *The City of God*, wrote that "if there is no right where there is no justice, then most certainly it follows that there is no republic where there is no justice."<sup>6</sup> History, St. Augustine, and common sense are in general agreement on this point. All of those things which are most likely to endure and benefit our society are dependant upon the work which is done in building a solid base reliant upon concepts which embody an appreciation of

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5. DAVID MELLINKOFF, *LANGUAGE OF LAW* vii (1963).

6. *THE WORKS OF AURELIUS AUGUSTINE*, trans. Marcus Dods, vol. 2, p. 331 (1871).

freedom, equality and justice. This is what we strive to reflect in all of our endeavors as professionals in the field of law.

Unfortunately, this fundamental mission is easily forgotten. It is a type of common knowledge, which eludes us as we deal with the minutia of daily life and the building of our society's future, as well as our own. We get lost in the forest of High Ideas for all the right reasons, but end up lost just the same. One cannot aspire to the lofty heights of ideas such as compassion and sacrifice if one does not first work to anchor the spirit of man in the firmest groundwork possible. This seems to be especially so in the field of law, and we do our profession a disservice when we fail to recall the ideas upon which our society is based. Frequently, individuals and societies rely upon the law to serve as both the first and last bastion of justice to right wrongs. This is a profound burden, and we must negotiate its shadow filled interiors with all due diligence, never forgetting where we were originally heading, regardless of the various paths which we take during the course of the journey.

There are, of course, those who would argue that freedom, equality, and justice are in themselves high ideas; that these are ideas which, by their very nature, are intangible. I would disagree. These are ideas that require daily maintenance. Great men and women have toiled at the monumental, and frequently tedious, task of preserving, and upon occasion rebuilding, the pillars upon which we base our society. They have bled and they have sweat in the doing, and they have likely experienced a good deal of eye strain from serving in this capacity via the writing and the editing of such wonderful watch dog mechanisms as DePaul's own law review.

Such daily maintenance requires that we consider those criticisms which are most frequently leveled at legal writing. Namely, the accusation that most, if not all, legal writing is guilty of being "flabby, prolix, obscure, opaque, ungrammatical, dull, boring, redundant, disorganized, gray, dense, unimaginative, impersonal, foggy, infirm, indistinct, stilted, arcane, confused, heavy-handed, jargon and cliché-ridden, ponderous, weasling, overblown, pseudointellectual, hyperbolic, misleading, incivil, labored, bloodless, vacuous, evasive, pretentious, convoluted, rambling, incoherent, choked, archaic, orotund, and fuzzy."<sup>7</sup> Jeremy Bentham called all legal writing "excrementious matter" and "literary garbage."<sup>8</sup>

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7. *The Lawyer's Guide To Writing Well*, Tom Goldstein & Jethro K. Lieberman, *supra* note 4, at 3. Quoting a survey of 650 people.

8. THE WORKS OF JEREMY BENTHAM 260 (Bowring ed. 1843).

Many, many books have been written on the topic of bad legal writing. An entire library could be devoted to this topic. There are law journals dedicated to this issue, not the least among which is *The Scribes Journal Of Legal Writing*.<sup>9</sup> The *Scribes Journal* puts it best in their mission statement, explaining that the "writing in the *Journal* should exemplify the qualities we advocate: lucidity, concision, and felicitous expression. [The *Journal*] hope[s] to spread the growing scorn for whatever is turgid, obscure, and needlessly dull."<sup>10</sup>

There are, no doubt, many formalists who would sneer at this sentiment. Richard Posner wrote a lengthy discussion on the relationship (or lack thereof) between law and literature in his book, ironically entitled, *Law and Literature*.<sup>11</sup> Posner makes the point that "law and literature have significant commonalities and intersections, but the differences are as important."<sup>12</sup> Well, yes, of course. Posner's point bears remembering. However, bad writing is, at the end of the day, bad writing, and with this, I think Posner would agree. It is apparent that, as a profession which relies upon the ability to write well, we must address the accusations of flabbiness and incoherence which plague the quality of our communications.

I would suggest a quick and easy partial fix. All writers, whether one is the author of a novel or a motion to compel (the two sometimes being nearer in likeness than we would like), should keep at hand a copy of Strunk and White's *The Elements of Style*.<sup>13</sup> This book is priceless. It contains those fundamental rules which all writers need to know. It contains only that. No fluff. No sugar coating. No filler. If, in our career in the field of law, we might be able to master only half of the rules of grammar and style articulated in this little book, we would be well on our way to making the world a better place through the clarity and lucidity of our individual writings. This is not overstatement. This is the truth and anyone who is already an *Elements of Style* devotee will recognize it as such. It is for the rest to continue to toil in darkness until such time as they are able to pick up a copy of Strunk and White's gem of a book.

As noted, this suggestion is only a quick fix; the first step in the right direction toward being the best that we can be in our role as writers. The second step is to be vigilant, to avoid falling into bad

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9. *The Scribes Journal of Legal Writing*, Vol. 7, (Mathew Bender, publisher 1998-2000).

10. *The Scribes Journal of Legal Writing*, Vol. 7, back cover (Mathew Bender, publisher 1998-2000).

11. Richard Posner, *Law And Literature*, Harvard University Press, (1998).

12. *Id.* at 7.

13. William Strunk Jr. & E.W. White, *The Elements of Style* 3<sup>rd</sup> ed. (Allyn & Bacon 1979).

writing habits which only serve to hinder our attempts at articulation of ideas. The use of boilerplate language, legalese, and poor cite checking are a few such habits that come immediately to mind. By committing ourselves to monitoring the quality of our work, the recalling and staying true to the purpose of our writing, we become part of that great endeavor which I mentioned previously. We become a member of that community which toils daily toward building a just society through the quality of our work.

It is not enough for us to just grasp the big picture, to “get” the High Ideas, or to be able to write just well enough to get by. One must also understand that the devil is in the details. The endeavor to become better writers, no matter how good a writer we might be or how good a writer we might think we are, may seem like minutia when one is dealing with the day to day of a law practice or a law review. Sacrificing quality to meet a deadline is not particular to our profession. But it is vital to our role as professionals working toward building as just a society as possible to be more than “ok.” Quite frankly, it is our job to try to be better than acceptable. We must work to do better.

As I have discussed, the phenomenon of becoming a bit lost in the forest of High Ideas is not unknown in the circle of legal-academic publishing. Nor is it alien to the practice of brief writing. Nor is it alien to the judicial branch. Many well intentioned legal opinions have done more to muddy already unclear waters. Surely, judges would argue that the same can be said of a fair number of motions and briefs which pass their desks, and the desks of their hapless clerks. At issue here are the responsibilities of a law review, as many of the judges, lawyers, and professors of tomorrow will be fine tuning their writing skills in the law reviews of today.

Though well meaning, many otherwise fine reviews get caught up in pursuits of intellectual gymnastics, which, while impressive for their leaps of reasoning and logic, do not have practical applicability in a general sense. That is to say, they may strike us as book smart, but they possess very little walking sense to speak of. It is the quality of remaining true to our foundation, based in commonality and humanity, which should be the primary focus of a good law review.

Admittedly, this is not a glamorous quality by today’s standards. After all, how much time does one *really* want to commit to writing an article about Rule 8(b) of the Federal Rules of Civil Procedure, dissecting the exact meaning of what constitutes a “belief” when

“form[ing] a belief as to the truth of an averment.”<sup>14</sup> For that matter, how much time does one really want to spend reading such an article? However, *it is essential* that every one of man’s institutions possess this basic understanding of the bedrock principles upon which it is based. Furthermore, it is a fundamental requirement that we all possess the rudimentary knowledge necessary to understand the rules of law as well as the formal rules (and informal ones for that matter) of legal writing. It is not enough that we be able to wow one another with our understanding of the rules of grammar. It is not enough that we know exactly where to insert a comma and understand precisely the purpose of the semi-colon. Without a doubt, the importance of this type of knowledge cannot be understated. It is vital. It is part of the foundation of which we speak. But it is not the foundation itself.

There is more to solid legal writing, and a solid law review, than the correct usage of commas and semi-colons. There is a type of hidden truth that flows like an unseen river through the unconscious mind as we write. This is important. In fact, it is essential to all good writing, legal or otherwise. It is this unseen river of truth that we must adhere to as we sit down to write whatever it is that we write. It does not matter if we swim within its fastest currents or linger safely in the shallows. Rather, it is only important that we follow this truth, this honesty, as we make our way downstream and follow our chosen path in law. It is essential that we maintain our focus on what is truly important despite superfluous trends of thought and cultural shifts whose compelling come-hither looks can be so very blinding as we examine ourselves, our laws, and the law making process.

This cannot be stressed enough. This bit of wisdom seems rather obvious, common sense that we should all possess. But, we forget the importance of life’s simple lessons as we go along our way, making money, striving for recognition, trying to please our bosses, our clients, ourselves. So we do well to remind ourselves of these basic life lessons now and again. This is just such a lesson: We must be honest and truthful as we write. If we are not, the price is steep. Kahlil Gibran stresses this point in *The Secrets of the Heart*,<sup>15</sup> reminding us that “[p]ersecution cannot harm him who stands by Truth. Did not Socrates fall proudly a victim in body? Was not Paul stoned for the sake of Truth? It is our inner selves that hurt us when we disobey it, and it kills us when we betray it.”<sup>16</sup> I admit, the way Gibran puts it, it

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14. Federal Rules of Civil Procedure, Rule 8(b).

15. Kahlil Gibran, *THE SECRETS OF THE HEART*, trans. Anthony R. Ferris (1947).

16. Kahlil Gibran, *THE SECRETS OF THE HEART*, trans. Anthony R. Ferris, p. 157 (1947).

sounds overly deep and just a touch morbid. Nonetheless, it has that universal ring of truth to it, one which is recognizable to all.

In the end, honesty is the only way to successfully overcome nasty undertows which would otherwise drag us under. In law, this possibility is especially daunting, for many times we operate as officers of the court. We frequently perform in a dual capacity as both the seeker and the protector of truth. Our job as truth tellers in our writing is doubly important to our system of justice. It is not enough that we do better for ourselves, that we maintain the status quo for our communities. We must do more than make money and amass accolades.

It is easy to criticize. Any first year law student can pen an essay that is little more than a laundry list of critiques. To put it another way, we can all grumble about the sad state of legal writing. I seek to do more than that, to issue a challenge to the DePaul legal community. The DePaul Law Review must strike out in pursuit of those ideas which best serve our world, all creatures big and small, rich and poor, powerful and weak. I refer back to Faulkner's assertion that as writers, we can remind ourselves and our society that we are capable of great things, that we can be creatures of compassion, courage, honor and hope, that we must look both to the past and the future as we build upon the foundation of our society. But this cannot be done without first examining the most basic of principles that we subscribe to, without re-examining ourselves in the most fundamental ways, as individuals, as writers, as lawyers, as one among many in our community.

The idea of examining our most fundamental principles should not seem new to us. As members of the legal community, we are charged with providing answers to today's dilemmas by asking ourselves how we addressed similar issues in the past. But this can become dangerous, as it leads to intransigence and a lack of perspective. Oliver Wendell Holmes said that "it is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV."<sup>17</sup> It is difficult to find fault with such logic.

I submit that it behooves us to reexamine the foundation of our ideas on a constant basis. It was Thomas Jefferson who reminded us that laws and institutions, among which we can safely count the DePaul Law Review, "must go hand in hand with the progress of the human mind."<sup>18</sup> Jefferson urged us to advance our institutions to keep pace with the developments, the "new truths," and the enlight-

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17. OLIVER WENDELL HOLMES, "The Path of Law," 10 *Harvard L. Rev.* 457, 469 (1897).

18. Thomas Jefferson, letter to Samuel Kercheval, July 12, 1816, *THE WRITINGS OF THOMAS JEFFERSON*, ed. Paul L. Ford, vol. 10, pp. 42-43 (1899).



enment of the human mind.<sup>19</sup> My feeling is that we must recommit ourselves to just this mission, while remaining true to those fundamental propositions that we cherish as the rock solid foundation of our institutions. Despite outward appearances, the one does not preclude the other. Rather, the one requires the other in order to avoid stagnation of ideas and lack of progress. We must reach for the stars, while keeping our feet firmly on the ground if we are to prevail in the human endeavor.

The challenge for the DePaul Law Review, and the constituency that it serves, is to maintain the pillars upon which we have built our world. However, we must do so without sacrificing the novel idea of tempering this appreciation for precedent and tradition with the goal of constant reexamination of the same. We must recall these two elements as we set pen to paper or fingertips to keyboard because, quite frankly, that is our duty if we care about the future of our law review and the community which it serves. It is not enough, as Faulkner says, to merely serve as the "record of man" as we decide what is worthy of our law review. Proper due must be paid to our ability to effectively communicate as writers and to do so with complete and utter honesty, or we will fail in our endeavors, whatever they might be. I submit that it is this two-prong approach which will ensure not merely that the DePaul Law Review endures, but that it prevails gloriously.

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19. *Id.*